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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

DINO ALFRED CARDELLI,

Defendant and Appellant.

A143016

(Humboldt County  
Super. Ct. Nos. CR1005536 &  
CR1100227)

**MEMORANDUM OPINION<sup>1</sup>**

This is defendant's third appeal in this matter. He pleaded guilty in 2011 to the continuous sexual abuse of one minor, annoying or molesting a second minor, and attempting to dissuade the first minor from testifying. (*People v. Cardelli* (Oct. 31, 2012, A133794) [nonpub. opn.] (*Cardelli I*)). Defendant was sentenced to an aggravated term of 16 years on the sexual abuse charge and a consecutive sentence of two years on the charge of dissuasion. In his first appeal, defendant contended the trial court imposed sentence under the erroneous belief that consecutive sentences were legally mandated. We agreed and remanded for resentencing on this issue.

On remand, the trial court imposed the same sentence. (*People v. Cardelli* (Mar. 28, 2014, A138800) [nonpub. opn.] (*Cardelli II*)). On appeal from that sentence, defendant contended the trial court erred by failing to hold a *Marsden* hearing after counsel opened the hearing by noting his performance at the initial sentencing had been

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<sup>1</sup> We resolve this case by a memorandum opinion pursuant to California Standards of Judicial Administration, section 8.1.

criticized by appellate counsel and defendant voiced concerns based on that criticism. Instead, the court declined to consider the issue because of the limited scope of the resentencing hearing. (*People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).) Again we agreed with defendant. In the disposition of our decision, we stated: “The judgment is conditionally reversed. The matter is remanded with the following directions: (1) the court shall hold a hearing on defendant’s *Marsden* motion concerning his representation by appointed counsel; (2) if the court finds defendant has shown that a failure to replace his appointed attorney would substantially impair his right to assistance of counsel, the court shall appoint new counsel to represent him and shall entertain such applications as newly appointed counsel may make, including a request for resentencing; and (3) if newly appointed counsel makes no motions, any motions made are denied, or defendant’s *Marsden* motion is denied, the court shall reinstate the judgment.” (*Cardelli II, supra*, A138800.)

Both parties argued *Cardelli II* on the assumption that the attorney who represented defendant had been appointed. In fact, unknown to us, this assumption was incorrect. The attorney who had represented defendant throughout the proceedings was retained. When counsel’s retention was confirmed at the initial hearing following remand from *Cardelli II*, the trial court declined to conduct a *Marsden* hearing, correctly reasoning that *Marsden* applies only to appointed counsel. After defendant expressed continued dissatisfaction with his attorney, however, the court relieved retained counsel and appointed the public defender. The court scheduled a further hearing, telling defendant, “we’ll come back to see the status regarding that appointment and their participation.”

Prior to the further hearing, the public defender, Kevin Robinson, filed a trial brief arguing that although the trial court could have reinstated judgment at the initial hearing after declining to hold a *Marsden* hearing, by appointing new counsel the court implicitly “found that ‘a failure to replace [defendant’s] appointed attorney would substantially impair his right to assistance of counsel,’ ” under the terms of our disposition in *Cardelli II*. Accordingly, Robinson argued, it would be appropriate for the court to

entertain an application for resentencing. Because he had yet to receive information from retained counsel, Robinson said, he was not in a position to address the merits of resentencing.

At the subsequent hearing, Robinson told the trial court he was seeking guidance from the court as to his “role . . . in this case,” again offering to review the performance of retained counsel at both sentencing hearings to determine whether any further steps were warranted. The trial court declined, finding that in light of its refusal to conduct a *Marsden* hearing, the mandate of *Cardelli II* had “been addressed.” The court affirmed the judgment and sentence without further discussion.

On this appeal from that ruling, defendant argues that, regardless of whether his attorney was retained or appointed, the trial court erred in failing to inquire into his dissatisfaction with counsel upon remand following *Cardelli I*. Further, because his attorney was retained, defendant had the right at that time to discharge the attorney “with or without cause.” (*People v. Ortiz* (1990) 51 Cal.3d 975, 983.) No *Marsden* finding of conflict was necessary. (*Ortiz*, at pp. 983–984.) Accordingly, it was error for the trial court upon remand from *Cardelli II*, to preclude any further inquiry into counsel’s performance merely because *Marsden* was inapplicable. The Attorney General concedes the issue, concluding in her respondent’s brief, “[the Attorney General] joins in appellant’s request to remand this case to allow appointed counsel to review the assistance of counsel at appellant’s initial sentencing hearing . . . , and to provide appointed counsel with the transcript necessary to determine whether there are any valid applications to ‘make, including a request for resentencing.’ ”

Again we agree. While the factual premise of our decision in *Cardelli II* was incorrect, our underlying reasoning was not. Upon remand from *Cardelli I*, the trial court erred in brushing aside defendant’s concerns about counsel because of the limited scope of the resentencing hearing. On remand from *Cardelli II*, the trial court properly recognized its duty to release defendant’s retained counsel and appoint new counsel for him. For purposes of the disposition in *Cardelli II*, however, this was the functional equivalent of the grant of a *Marsden* motion. Under the terms of that disposition, if the

trial court granted a *Marsden* motion and appointed new counsel, “the court shall . . . entertain such applications as newly appointed counsel may make, including a request for resentencing.” Only “if newly appointed counsel makes no motions [or] any motions made are denied” was the court permitted to reinstate the judgment. (*Cardelli II, supra*, A138800.) By denying Robinson the opportunity to review the record and determine the appropriateness of further motions, the trial court failed to comply with the terms of our disposition.

We conditionally reverse the judgment. On remand, the trial court shall provide the public defender with any materials necessary to review retained counsel’s representation and shall entertain any applications the public defender deems appropriate, based on that review. This may include a request for resentencing in its entirety on the ground that retained counsel provided ineffective assistance in connection with defendant’s original sentencing. If the public defender makes no motions or if the trial court denies the motions, the court shall reinstate the judgment.

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Margulies, Acting P.J.

We concur:

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Dondero, J.

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Banke, J.